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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

10 ENCANARCION AGUILAR,  
11 Plaintiff,  
12 v.  
13 WILLIAM KULOLOIA, *et al.*  
14 Defendants.

Case No. 2:06-CV-1002-KJD-PAL

## ORDER

16 Presently before the Court is Defendants' Motion to Dismiss (#55). Plaintiff filed a response  
17 in opposition (#61).

18 || I. Procedural History

This civil rights action was filed under 18 U.S.C. §1983 by an inmate at the High Desert State Prison in Indian Springs, Nevada. The plaintiff, proceeding *pro se*, was granted *in forma pauperis* status on September 21, 2006. Plaintiff filed his Complaint (#4) on August 22, 2006, in which he alleges the defendants at the Nevada Department of Corrections (“NDOC”), housed him with a dangerous gang member, Richard Delgado (“Delgado”), who severely beat him; housed him with inmates who smoked, exposing the plaintiff, a non-smoker, to unacceptably high levels of environmental tobacco smoke; failed to timely or adequately provide medical treatment for wounds including four broken bones in the nose and face sustained as a result of the beating by his cell mate;

1 affirmatively denied the plaintiff necessary medical care; and required the plaintiff to pay restitution  
2 in the form of his cell mate's medical bills without affording the plaintiff an opportunity to appeal the  
3 decision or the amount of restitution, all in violation of his constitutional rights under the Eighth and  
4 Fourteenth Amendments.

5 On September 28, 2007, the Court granted in part and denied in part (#35) Defendants' first  
6 Motion to Dismiss (#24) dismissing claims against Defendants in their official capacities, and  
7 granting summary judgment on Plaintiff's first count as to William Kuloloia only, second count as to  
8 Officer Fowler only, third count, sixth count and seventh count. On April 4, 2008, Plaintiff filed his  
9 First Amended Complaint (#52) making the same claims, including the ones which had been  
10 dismissed, and substituting the names of actual defendants for doe defendants. On May 12, 2008,  
11 Defendants filed the present motion to dismiss asserting that Plaintiff had failed to exhaust  
12 administrative remedies as to all claims and that many of the claims had already been dismissed by  
13 the Court's previous order (#35).

14 II. Exhaustion of Administrative Remedies

15 The Prison Litigation Reform Act of 1994 requires that a prisoner exhaust any and all  
16 administrative remedies before filing a case in federal court. See Woodford v. Ngo, 548 U.S. 81, 85  
17 (2006). "Proper exhaustion demands compliance with an agency's procedural rules because no  
18 adjudicative system can function effectively without imposing some orderly structure on the course  
19 of its proceedings." Id. at 90-91.

20 A motion to dismiss for failure to exhaust nonjudicial remedies is treated as an unenumerated  
21 12(b) motion. See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding a motion to  
22 dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and  
23 decide disputed issues of fact. See id. at 1119-20, citing Ritza v. Int'l Longshoremen's &  
24 Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988). If the district court concludes that the  
25 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without  
26 prejudice. See id. at 368 n.3 (1988).

1       The State of Nevada has given the NDOC the power to enact regulations to establish a  
2 grievance procedure for inmates. See Nev. Rev. Stat. § 209.243. A prisoner must initiate the  
3 grievance procedure by filing an administrative claim “within [six] months after the date of the  
4 alleged loss, damage or injury.” Id. In accordance with section 209.243, the NDOC has adopted  
5 Administrative Regulation 740 (“AR 740”), establishing a grievance process for resolution of inmate  
6 problems and concerns.

7       An inmate must complete three levels of review, two formal and one informal, in order to  
8 exhaust his administrative remedies. See AR 740.02, 1.1.1. An inmate must first file an “Informal  
9 Grievance”. AR 740.02, 1.1.1.1. An inmate who is dissatisfied with the response may appeal the  
10 grievance to the next level. AR 740.02, 1.1.1.4. An inmate has five (5) days after the receipt of the  
11 response to his grievance to appeal to the next level of review. AR 740.02, 1.3.4. Once an inmate  
12 receives a response to his second level grievance, he is considered to have exhausted available  
13 administrative remedies. The regulations require a response to the grievance within twenty-five (25)  
14 calendar days of it being received by the Department’s respondent, but allows inmates to proceed to  
15 the next level if no response is received within the twenty-five (25) days. See AR 740.02, 1.3.3;  
16 1.3.6.

17       In this case, Plaintiff entirely failed to exhaust his administrative remedies for his remaining  
18 claims.<sup>1</sup> He claims to have filed his first grievance, the required informal grievance, on December  
19 24, 2004 and that it was never responded to by NDOC. Even assuming that grievance was timely, he  
20 failed to exhaust his remedies, because he failed to appeal to the next level in a timely manner. The  
21 regulations clearly require Plaintiff to appeal to the next level no later than thirty (30) days after he  
22 filed his informal grievance. Instead Plaintiff admits that he waited until April 26, 2005 to file  
23 another grievance. Since the regulations expressly allowed him to appeal to the next level if no

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25       <sup>1</sup>Defendants admit that Plaintiff fully grieved the issues regarding the findings of the  
26 disciplinary hearing where he was ordered to pay inmate Delgado’s medical bills. However, the  
Court granted summary judgment on this claim in its Order (#35) on Defendants’ first Motion to  
Dismiss (#24).

1 response was made, he failed to properly exhaust his administrative remedies. See Ngo, 548 U.S. at  
2 90-91. Therefore, the Court must dismiss his complaint without prejudice.

3 III. Conclusion

4 Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#55) is  
5 **GRANTED**,

6 IT IS FURTHER ORDERED that Plaintiff's Amended Complaint is **DISMISSED without**  
7 **prejudice**.

8 DATED this 18<sup>th</sup> day of February 2009.

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12 Kent J. Dawson  
13 United States District Judge  
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